IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 253 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ASHIMA LIMITED

Versus

DOMBIVLI NAGARI SAHAKARI BANK LTD.

Appearance:

1. Appeal from Order No. 253 of 2003

NANAVATI & NANAVATI for Petitioner No. 1

MR PRAKASH C SHAH for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 11/09/2003

ORAL JUDGEMENT

1. The appellant-original plaintiff is a Public Limited Company governed under the provisions of the Companies Act, 1956 (herein after referred to as the Act)

having its Registered Office at 310, Ashima House, Kavi Nanalal Marg, Ahmedabad. The respondent-original defendant Dombivli Nagarik Sahakari Bank Ltd. (hereinafter referred to as the defendant Bank) is a Scheduled Bank and is a Co-operative Bank duly registered under the Maharashtra Co.Op. Societies Act,1960.

2. The appellant-original plaintiff has filed the present Appeal from Order under O.43 R.1 of C.P.C., inter alia, praying to quash and set aside the order dated 28th July, 2003 passed below Exh.6-7 in Civil Suit No.1675/2003 by ld. Chamber Judge, City Civil Court, Ahmedabad and to restore the ad-interim injunction granted by the Lower Court vide order dated 3.6.2003 passed below Exh.6-7.

3. I have gone through the memo of appeal and certified copy of the stay application preferred by the plaintiff before the Civil Court. Undisputedly, the defendant Bank had extended certain financial assistance to the plaintiff company in the form of Bill Discounting Facility and against said facility, the plaintiff company has given Collateral security to the defendant Bank by pledging 11,12,000 numbers of Equity Shares and plaintiff company also pledged 8,53,345 numbers of Equity Shares of M/s Nachmo Knitex Ltd. Both the bunches of shares on the date of filing of the suit were lying in the custody of the defendant Bank. Initially, the Bill Discounting Facility was granted for an amount of Rs.2.25 Crores, but in November 2001, the said limit was renewed and increased by the defendant Bank to the tune of Rs.3.25 Crores.Said facility has been renewed from time to time. The appellant plaintiff company filed Civil Suit No.1675/2003 on 30.6.2003 in City Civil Court, Ahmedabad and it is pleaded by the plaintiff company that under the Notification issued by the Govt. of Gujarat dated 11.11.2002 (herein after referred to as the said Notification), the plaintiff company has been declared to be a "relief undertaking" under the provisions of Bombay Relief Undertakings (Special Provisions) Act, 1958 (hereinafter referred to as the BRU Act) and in view of the provisions of Sec.4 of the BRU Act, the Bank is debarred from prosecuting any remedy for the enforcement of its rights against the company. So, the main relief in the suit filed by the appellant plaintiff company is that the defendant Bank should be restrained from disposing of the Equity Shares lying with the Bank as property pledges in view of the protection granted to the plaintiff under the provisions of the BRU Act. Application exh.7 was moved for interim prohibitory relief in terms of para-16(A) under O.39 R.1 & 2 of CPC. Initially, the ld. Chamber Judge, City Civil Court

granted ad-interim injunction, but by the impugned order dated 28.7.2003,the ld. Chamber Judge rejected the notice of motion and vacated ad-interim relief granted earlier. Ld. Chamber Judge also held that plaint be returned to ld. Advocate for the plaintiff company with a direction to present it before the appropriate Court in accordance with law. While dealing with the said application, ld. Chamber Judge has held that transaction had taken place at Mumbai i.e. beyond the territorial jurisdiction of the City Civil Court, Ahmedabad and the share certificates have also been given to the Bank and it was also agreed between the parties that transactions are subjected to Mumbai Jurisdiction. The appellant plaintiff company has challenged the legality and validity of the said order in this appeal on merits.

4. I have heard ld. counsel appearing for the parties. It is submitted by ld. Senior Counsel Mr. Sudhir Nanavati for the appellant plaintiff that identical points and disputes were raised by the plaintiff company against one another Bank i.e. Greater Bombay Co.Op. Bank Ltd. by filing Civil Suit No.1449/2003 in City Civil Court, Ahmedabad. While dealing with notice of motion and application for stay in the said suit, vide order dated 18.7.2003, ld. Chamber Judge dismissed the application for stay and rejected notice of motion and recorded similar findings which have been recorded by the ld. Chamber Judge in the present proceedings. That facts of aforesaid Civil Suit No.1449/2003 and facts of Civil Suit No. 1675/2003 are mostly similar. Ld. Senior Counsel Mr. Nanavati has further submitted that the plaintiff company had challenged aforesaid order dated 18.7.2003 passed by the ld. Chamber Judge in Civil Suit No.1449/2003 by filing Appeal from Order No. 244/2003 in this Court and this Court, while dealing with the said AO, vide judgment & order dated 31.7.2003 partly allowed the said Ao inasmuch as the finding recorded by the ld. Chamber Judge with respect to the jurisdiction of the Civil Court at Ahmedabad was quashed and set aside and consequently he order returning the plaint was also quashed and set aside. It was further ordered that the question of jurisdiction shall be decided after the whole evidence is brought before the Court. The Court also held that the plaintiff has no right to restrain the Bank from encashing the cheques deposited with the Bank. Ld. Senior Counsel Mr. Nanavati has, therefore, submitted that in the present case also, it would not be correct to say that entire transaction has taken place at Mumbai as alleged by the Bank and that point of territorial jurisdiction is not a pure question of law, but the same

is a mixed question of facts and law and hence the finding recorded by ld. Chamber Judge regarding jurisdiction issue in the present proceedings also requires to be reversed. So-called understanding or agreement as to jurisdiction does not contain any clear recital with respect to jurisdiction of court of law in case of dispute. Ld. Senior Counsel Mr. Nanavati has submitted similar arguments were also raised in aforesaid AO No.224/2003 and accepting the same, this Court, as aforesaid, partly allowed said AO reversing the finding on the Lower Court on the issue of territorial jurisdiction. I have gone through the facts of the suit of the present proceedings and suit referred to by ld. Sr. Counsel Mr. Nanavati and I am satisfied that the facts of both the suits and contentions of law raised qua both the suits are mostly identical and, therefore, decision of this Court in AO No.224/2003 dated 31.7.2003 would squarely apply to the facts of the present case and consequently finding recorded by ld. Chamber Judge qua jurisdiction and return of plaint requires to be reversed.

5. The second contention raised by ld. Senior Counsel Mr. Nanavati as to statutory bar is not well-founded. The suit has been instituted to enforce the immunity provided to the plaintiff company under Section 4 of the BRU Act. The date of agreement between the Bank and the plaintiff company whereby the plaintiff was extended Bill Discounting Facility is much earlier to the date of issuance of notification by the Government. It is contended that the right to recover dues for which the Bank intends to sell off Equity Shares lying as pledged with it, had accrued prior to the date of issuance of Notification and, therefore, the defendant Bank is not authorised to sell off the shares to realise the amount allegedly payable by the plaintiff and/or recoverable by the defendant company. But, I have seen the relevant dates and in the present case, the liability has accrued after 11.11.2002 and, therefore, the same is not covered by the said Notification. The immunity granted under the Notification or under the provisions of BRU Act only provides for suspension of the rights or past remedy,but it does not cover all the liabilities or future liabilities. There is no immunity granting cover to the plaintiff company against all required payments for the liabilities accrued after issuance of Notification.The documents produced with the list exh.18 clearly indicate that the cheques are issued after Notification and the shares pledged with the defendant Bank by way of Collateral Security also would not get any protection in view of the provisions of BRU Act. The provisions of BRU Act do not apply to the Collateral

Securities when the same has not been given by the plaintiff company. Shares of the plaintiff company are lying with the defendant bank does not change the nature of security. The alleged protection granted under the Notification is to the plaintiff and not to the Directors who have given Collateral Security as guarantee. The documents mark 18/12 & 18/13 clearly indicate that a third party can not pray for protection. The plaintiff company can not press any cause of action for a third party. In the matter of M/s D.S. Patel & Co. v/s Gujarat State Textile Corporation Ltd. & Ors., 1972 GLR P.33, the constitutional validity of Sections 3 & 4 of the BRU Act was the subject matter of challenge of the Division Bench of this Court. While upholding the constitutional validity of the said provisions, it has been observed that " it is undoubtedly true that sub-clause (iv) is so worded suspended is not only the remedy for the enforcement of the right to hold but also the right itself. We find that on true construction of this sub-clause the right itself is not suspended but only the remedy for the enforcement of the right is suspended. In our opinion, this appears to be true construction of sub-clause (iv) because, if this sub-clause is interpreted as suspending the very existence of the rights covered by the notification issued under Section 4, the very object of the statute would be frustrated. This will be evident from the discussion which follows."

6. In the case of The Choryasi Taluka Dudh Vechan Karnari Sahakari Mandali Ltd. v/s The Surat District Co.Op. Milk Producers' Union & Ors., 1972 GLR P.797, while considering whether the dispute in question was touching the business of the society as envisaged under Section 96 of the Gujarat Co.Op.Societies Act, 1961, the Hon'ble Court observed that "the dispute whether it falls under Section 96(1) is a mixeded question of of law and facts because it has to be a dispute touching the constitution, management or business of the Society. Such complicated question would have at time be decided after taking the evidence."

7. Undisputedly the plaintiff company is a member of the defendant Co.Op. Society -Bank and the plaintiff company being its member, by paying heed, had extended the assistance by extending Bill Discounting facility. The charge of post-dated cheques given to the defendant bank which is at page 26 of the paper-book shows that the first cheque is of 2nd July 2003 and the last one in the table is of 25th September,2003 and total amount of all the cheques comes to Rs.2,87,91,469-00. This amount is

reflected in the prayer clause of the suit viz. Para-16(A). A letter written by the defendant Bank which is at page 23 of the paper book is of 24.7.2002 which talks about renewal of the Bill Discounting facility. This letter is written in reference to the letter written by the plaintiff company requesting renewal of the said facility. So, this is not a case of a term loan. A liability for such bill would arise when the bill is discounted and each transaction of the bill is a separate liability. Therefore, the submissions advanced by ld. Senior Counsel Mr. Nanavati that the transactions between the plaintiff and defendant would fall under the umbrella of protection granted under Sections 3 & 4 of the BRU Act, would not help and the amount referred to by the plaintiff in the suit can not be said to be an amount and/or liability covered by the notification issued under the provisions of the BRU Act. When this Court is supposed to evaluate the strength in the case of the plaintiff, prima facie, it can be concluded sensitively that on this issue the chance of success of the plaintiff company in the suit is under cloud. It is also important to note that this Court, while dealing with AO, is supposed to consider the point of balance of convenience. The plaintiff company, undisputedly, has created liability after protection granted by the Govt. of Gujarat in the month of November-2002. Financial Institute like Co.Op.Bank may be or may not be aware about the issuance of such notification under Section 4 of the BRU Act granting protection to the plaintiff company.So, if the stay against the recovery or right to encash the cheque which was to be encashed against the discounted amount recoverable under the discounted bill is granted, then such a financial institution or bank may get paralysed or at least will be put to grate hardships and inconvenience. This aspect also needs serious consideration and no discretionary relief to such plaintiff could have been granted.

8. The ratio of the decision in the case of R.S.D.V. Finance Co. Pvt. Ltd. v/s Vallabh Glass Works Ltd., AIR 1993 SC 2094, may also come in the way of the say of the plaintiff wherein the Apex Court has observed that "The Gujarat Legislature is not competent to regulate, modify or extinguish the obligations and liabilities incurred by a "relief undertaking" (declared as such under S.3 of the Bombay Act) outside the State of Gujarat nor can it suspend or stay the suit or other proceedings relating to such obligations and liabilities. Section 4(1)(a)(iv) is not effective to suspend the plaintiff-appellant's right to money nor can it operate to stay the proceedings in the present suit in the Bombay

Court."

The obligation to pay the amount or discharging the liability qua each bill discounted by the defendant bank, prima facie, can be said to be a liability or obligation incurred by the plaintiff out side the State of Gujarat and, therefore, the proceedings relating to such obligation and/or liability can not be said to have been pushed under suspension.

9. The question whether the suit instituted without giving notice as envisaged under Section 164 of the Act is maintainable or not would depend upon whether the suit is in respect of matter touching the business of the Bank. If it is held that the subject matter of the suit can not be said to be one touching the business of the Bank, the plaintiff would not be under an obligation to give notice as envisaged in Section 164 of the Act. In that case, the suit would still be maintainable. Section 164 of the Act reads as under:-

"164. No suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left."

In the submission of ld. Sr.Counsel Mr. Nanavati, the suit has been instituted by the plaintiff for enforcing its right flowing from the Notification dated 11th November, 2002 against the right to recover the suit amount accrued to the Bank. Therefore, the subject matter of the suit can not be said to be the one touching the business of the bank. I am afraid, I am unable to agree with Mr. Nanavati. The suit is essentially one for estopping the Bank from recovering its dues by encashing the suit cheques. The defendant being the bank and Banking being its business, advancing loan and receiving the loan amount with interest is essentially its business.Hence, suit essentially is in respect of act touching the business of the Bank. The suit, therefore, could not have been instituted until after expiration of two months after notice in writing as envisaged in Section 164 of BRU Act was delivered to the Registrar or was left at his office. I am, therefore, of the view that the suit is not maintainable for want of

notice, as envisaged in Section 164 of the Act.

10. As mentioned earlier, the defendant Bank is a registered Co.Op.Society under the provisions contained in Maharashtra Co.Op. Societies Act, 1960. Section 91 of the Act provides full machinery for resolving the dispute between a member and a society. Special forum is created by Section 91 for resolving the dispute between the members of the defendant society, its grievance in connection with the business of the Society, can not be adjudicated by any other forum than the one provided under The Maharashtra Co.Op.Societies Act. Even if the plaintiff company was of the view that its intending action claiming special protection under the BRU Act and that too in reference to the transactions which had taken place between the defendant Bank and its member company (plaintiff), a statutory notice at least ought to have been served to the defendant Bank prior to the institution of the present suit. It is not the say of the plaintiff that when the present suit has been instituted after service of statutory notice provided under Section-164 of the Act. This Court has dealt with similar facts situation while dealing with AO No.244/2003 preferred by the present appellant against Greater Bombay Co.Op.Bank Ltd., has concluded that the suit against the Co.Op.Bank is not maintainable for want of notice as envisaged under Section 164 of the BRU Act. The arguments advanced by the ld. Senior Counsel Mr. Nanavati is not found acceptable that the issues raised by the appellant can not be said to be a dispute touching the business of a Co.Op. Society, but it is an independent grievance by the member against a society who has threatened its member for recovery of amount for enforcement of an action against the law in violation of the statutory protection granted under the Notification issued under the BRU Act. It is also important to note that in case of M/s D.S.Patel & Co. (Supra), the Court has observed that what is barred under Section 4 of the BRU Act is the remedy of enforcement of the right and not the right itself. Therefore, even if the suit transaction falls in the category of liabilities covered by the Notification, the bar under Section 4 of the BRU Act would be against the proceedings of recovery of the loan amount by encashing the suit cheques in ordinary course of business and/or by realising the amount from selling the shares pledged by way of collateral security and that too by a third party namely a guarantor. The present case when is the case of encashing the cheques or collateral security is qua the liability incurred by the plaintiff against each bill when the same was discounted and, therefore, it can be concluded that the plaintiff

company has no right to restrain the bank from encashing either the post-dated cheques deposited with the bank or by encashing the property pledged by way of collateral security. In short, in light of the aforesaid reasons and discussion, the present AO requires to be allowed partly.

11. In the result, appeal is partly allowed inasmuch as the finding recorded by the ld. Chamber Judge directing the Registrar to return the plaint to the plaintiff by holding that the City Civil Court, Ahmedabad has no jurisdiction, is hereby quashed and set aside. Consequently, the order returning plaint is also quashed and set aside. The question of jurisdiction shall be decided by the City Civil Court, Ahmedabad after the whole evidence is brought before the Court and after evaluating the same. However, the orders rejecting notice of motion and vacating ad-interim injunction granted by ld. Chamber Judge, are hereby confirmed. Mr. M.C.Bhatt, ld. Senior Counsel appearing for the respondent Bank has fairly submitted that the defendant Bank shall pray for costs in the proceedings before the Civil Court. So, formal order as to award of costs is not passed at this stage.

12. The request extended by ld. counsel appearing for the plaintiff company that the interim injunction granted against encashing the suit cheques may be stayed for four weeks so that the appellant can approach higher forum, is hereby rejected.

11.09.2003 [C.K. BUCH, J]
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